United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,122 20106

LAWRENCE GARNETT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN PALMER,
Assistant United States Attorneys.

DONALD I. BIERMAN,
Special Assistant United States Attorney.

Cr. No. 70-66

QUESTIONS PRESENTED

1. Did the refusal of the trial court to instruct that many innocent people have guilt feelings unrelated to actual guilt constitute reversible error when the court had already instructed that there can be many reasons for flight and when no evidence relative to this requested theory was introduced at trial?

2. Was the court's instruction on aiding and abetting, which included a charge that the jury must find knowledge and find that appellant was present with the explicit purpose and particular intent to commit the crime in order to convict, prejudicially erroneous?

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* Cases chiefly relied on are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,122

LAWRENCE GARNETT, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted and tried before a jury, together with codefendant Raymond Wilson,[1] on a two-count indictment charging housebreaking (22 D.C. Code § 1801) and grand larceny (22 D.C. Code § 2202). Appellant was found guilty of grand larceny[2] and was subsequently sentenced under the Youth Corrections Act.

[1] Robert Mitchell was also indicted however he was still at large at the time of trial.

[2] The jury acquitted Wilson of both charges and appellant of housebreaking.

On November 29, 1965, at 11:30 a.m. two police officers were cruising in the 900 block of 3rd Street, N.W. When they turned into the alley behind 3rd Street they observed two Negro men loading a television-stereo combination into the trunk of a Cadillac automobile. Officer Gambino testified that when the men saw him and his partner they dropped the set and ran. The officer chased them through an empty lot where the men ran in different directions (I Tr. 47-48). The officer caught appellant, Garnett, who immediately stated to him "What are you chasing me for? I didn't know it was stolen. I was just helping him move it." (I Tr. 49.) The officer also testified that the television set, three feet long, and four feet high and weighing about sixty pounds was identified by its owner Mrs. Eva Walls, of 916 Third Street, N.W., on the day of the arrest. When the set was returned to Mrs. Walls it took two officers to handle it (I Tr. 51-53.)

Officer Orman testified that prior to turning into the alley he and Gambino had heard a police radio call about activity in the alley behind the 900 block of 3rd Street. When the police car turned into the alley the two men who were placing the television set into the automobile trunk began to run. Orman pulled his car adjacent to the Cadillac and radioed in about the chase which was in progress. He then observed a Negro man laying prone on the front seat of the Cadillac. This man ran from the scene and was later identified as Raymond Wilson, the codefendant. The officer has seen Wilson in the street 15 to 20 times before the incident in question. The officer further testified that when James Caldwell came to claim the Cadillac he accused him (Caldwell) of being the man in the front seat (I Tr. 65-66.) When Caldwell's alibi was verified he was allowed to leave and to take his car (I Tr. 67).

Caldwell testified that he had lent his car to Robert Mitchell, who remained a fugitive during the trial, at 9:30 a.m. on November 29, 1965 (I Tr. 84). He also testified that appellant and Wilson were not with Mitchell

when he borrowed the car although they were all friends who had spent time drinking together (I Tr. 86, 88).

Mrs. Eva Walls, who lives at 916 3rd Street, N. W., testified that she left to go to work at the United States Soldier's home at her regular time, 6:40 a.m., on November 29, 1965 (II Tr. 3-4). She returned home in response to a telephone call at about 11:30 a.m. and found her house generally ramsacked and the kitchen window broken (II Tr. 5-6). She also testified that a television-stereo combination for which she had paid $339 in 1964 and eight to nine dollars in cash were missing. The television set which was found in the trunk of the car was later claimed at the police station after being identified by its serial number (II Tr. 7-10.) Wilson, who lived next door to the witness, had been to her house the night before the incident and had looked at the set (II Tr. 13-14).

Appellant testified to the effect that he lived in the neighborhood and had stepped into the alley to take a drink when Mitchell called him over and asked him to help move a television set in a car trunk (II Tr. 48-50). He stated that he had just taken a drink when the police turned into the alley. He ran because he didn't want to be arrested for drinking in public again as he had been in 1963 and 1965. (II Tr. 50-52.) He claimed that when he was caught he told the policeman why he had run and offered to show him where he had hidden the bottle. He denied making any statement about the stolen television set (II Tr. 50-51.)

On rebuttal Offiicer Gambino repeated his testimony relative to appellant's statement made at the time of the arrest (II Tr. 80-81).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking,

> any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2201, provides:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

SUMMARY OF ARGUMENT

The trial court correctly instructed the jury on the meaning which it could draw from flight if it found that appellant did, in fact, flee. There was no use of the term "presumption" which has been criticized by opinions of this Court. There is no requirement that a flight instruction include a statement that many innocent people have guilt feelings especially in a case where no evidence to that effect is offered.

The trial court correctly instructed the jury on the need to find that appellant had knowledge of the crime before he could be convicted as a principal through aiding and abetting. The instruction read as a whole makes it abundantly clear that there was no confusion as to the need to find guilt individually. The fact that the jury acquitted appellant's codefendant demonstrates that it was not finding group guilt.

ARGUMENT

I. The trial court gave a correct instruction on the inference which could permissibly be drawn regarding appellant's flight.

Appellant challenges the court's failure to instruct, per request, that consciousness of guilt does not reflect actual guilt.

The trial court instructed the jury as follows:

> Now you are instructed, ladies and gentlemen, that there is some evidence in this particular case that the defendant Garnett left or ran away during or after the incident in question in this particular case. Now if you are satisfied that the defendant Garnett did run or actually both, because the testimony is that Wilson also ran, that they did run, this in itself becomes a factor which you may take into consideration.
>
> Now flight or running away does not prove guilt because some people have been known to run when there is no particular reason to do so. But unexplained flight during or following an incident of crime such as that in this particular case is an element which you as jurors have the right, that is you have the right to consider if you so desire or if you so wish in deciding whether or not all of the circumstances of this case and the act of running away you may determine may be evidence of a consciousness of guilt so far as the defendant or the defendants are concerned. (II Tr. 108.)

The instruction given carefully points out that there may be many reasons why a person may flee. It tells the jury that it may consider flight as evidence of consciousness of guilt. The charge consistently reflected a permissive inference. Prior criticism for flight instructions have been aimed at erroneously allowing a presumption of guilt to be drawn from flight conduct. See *Miller* v. *United States*, 116 U.S.App.D.C. 45, 329 F.2d

767 (1963) and *Wright* v. *United States*, 116 U.S.App. D.C. 60, 320 F.2d 782 (1963).

Appellant recognizes that the instant instruction was correct in stating that flight may be the basis for inferring a consciousness of guilt. His argument, however, regarding the court's refusal to instruct that consciousness of guilt is inconsistent with actual guilt is based on an erroneous interpretation of the impact of this Court's subsequent reference in *Wright*, *supra*, to Judge Bazelon's separate opinion in *Miller*, *supra*. The instruction suggested by Judge Bazelon includes statements that, (1) flight does not necessarily reflect feelings of guilt and that (2) feelings of guilt do not necessarily reflect actual guilt.[3] Appellee asserts that it is not mandatory that this instruction be given when it is requested particularly in the absence of any evidence to support the thesis.

While it is undoubtedly true that the *Wright* opinion made references to Judge Bazelon's separate *Miller* opinion it can hardly be said that it held that the two-part flight instruction is required in all cases when requested. A careful reading of the opinion in *Wright* will reveal that the brunt of the Court's criticism of the flight instruction was aimed at the trial court's statement that flight "creates a presumption of guilt." Immediately after quoting this language the court said "This was error." The subsequent references to the footnotes in Judge Bazelon's *Miller* opinion were made to demonstrate the reasons why evidence of flight is too ambiguous to create a *presumption* of guilt, not to set forth a *requirement* that all future instructions on flight include the *Miller* two-part language. The trial court here did not use any erroneous presumption language rather it used an instruction similar to the one approved by this Court sitting *en banc* in *Edmonds* v. *United*

[3] This second part may, in a proper case, make relevant a proffer of expert testimony that a particular defendant did have feelings of guilt inconsistent with actual guilt. No such testimony was offered here.

States, 106 U.S.App.D.C. 373, 273 F.2d 108 (1959).[4] See also *Green* v. *United States*, 104 U.S.App.D.C. 23, 25, 259 F.2d 180, 182 (1958); *Tolliver* v. *United States*, 106 U.S.App.D.C. 398, 273 F.2d 523 (1959); *Hunt* v. *United States*, 115 U.S.App.D.C. 1, 316 F.2d 652 (1963), to the effect that flight is competent evidence of guilt.

There was no evidence offered that appellant felt general guilt feelings unrelated to any particular act. He did not offer testimony from a psychiatrist to that effect nor did he testify that he felt guilty about the television set even though he didn't steal it because of his earlier arrests for public drinking or for any other reason. With no evidence that appellant had false guilt feelings about the stolen television set there was no reason for the court to instruct on that theory.

II. The trial court properly instructed the jury as to guilt as a principal arising out of aiding and abetting in the commission of a crime.

Appellant argues that the trial court's refusal to give a specific requested instruction, had the effect of misleading the jury into believing that appellant did not have to know the television set was stolen in order to be convicted and that this was prejudicial error since there was no evidence that appellant knew the set was stolen. (Br. at 12-14). This conclusion is erroneous.

The court's instructions, read as whole, make it abundantly clear that knowledge is an essential element of

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[4] The instruction approved in *Edmonds*, 273 F.2d at 114, reads as follows:

> In this case, the government contends that the defendant committed the acts charged and that he fled from the scene of the alleged crime. That is, as I said, a contention on the part of the government. If you find that the defendant did flee from the scene, then you have a right to regard flight as an indication of consciousness of guilt if you choose to do so, but it is a matter within your discretion.

aiding and abetting.[5] The court first stated that the jury had to find appellant was present for the "purpose of assisting in the offense" with "particular intent" (II Tr. 105). This cannot be found without finding knowledge. The court, explicitly instructed the jury that to find aiding and abetting it had to find the defendants were "in concert with or had knowledge of or had sympathy with any person who broke it. . . ." (II Tr. 107).

The jury, which was properly instructed on knowledge, obviously chose to reject appellant's story that he was

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[5] Pertinent sections of the court's instructions are set out below:

> Now the law in the District of Columbia provides that any person advising or inviting or conniving in any offense or of aiding or abetting the principal offender, shall be charged as a principal. That is, he is as guilty of the offense as though had himself committed it. (sic)
>
> If two or more persons act jointly or in concert, each performing a part that results in the commission of the offense, each is equally guilty. However, the mere fact that one is present at the scene of the crime, even though he may be in sympathy with the person committing it, will not render him guilty as a matter of fact, or guilty of aiding and abetting.
>
> Now the jury must find beyond a reasonable doubt that the defendant or the defendants in this case were present actually or constructively, *for the purpose of assisting in the offense* that is stated in the indictment, that is the taking of the eight dollars of Mrs. Walls, and the Hi-Fi Combination set that was taken; that he or they, that is Garnett and Wilson, had the *particular intent* of the person who parked this car; that he participated or that they participated in furtherance of the criminal act either before or at the time of the commission. If you find beyond a reasonable doubt that one defendant in this case or both defendants did act in the assisting or in the commission of the offense charged, then they are charged as principals. . . .
>
> You have the questions of aiding and abetting. . . .
>
> The Court is only trying to tell you that under the aiding and abetting that if you find that they were in concert *or had knowledge of* or had sympathy with any person who broke in, or that they broke in themselves and that one of them was a driver of a vehicle, that it all falls within aiding and abetting; that any act under the criminal act, in the District of Columbia they are charged as a principal. . . . (II Tr. 105-106, 107, 108) (Emphasis supplied)

drinking in the alley when a friend called him over for his innocent aid in changing the position of a television set in a car trunk. The jury could have, and probably did, conclude that appellant had knowledge that the set was stolen from the testimony that immediately upon being caught he stated, "What are you chasing me for? I didn't know it was stolen. I was just helping him move it." (I Tr. 49).

Appellant has pointed to one sentence in the instructions[6] and reading it out of context asserts that it gave the jury the impression that only one person had to aid in the commission of the crime to find both guilty. (Br. at 14-15.) This is absurd. The instructions read as a whole make it abundantly clear that the defendants were to be treated individually.[7]

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[6] The sentence which appellant finds objectionable reads as follows:

> If you find beyond a reasonable doubt that one defendant in this case or both defendants in this case did act in the assisting or in the commission of the offense charged, then they are charged as principals. (II Tr. 106)

The term "they" was obviously used as a convenience to include either one or both depending on who the jury individually found guilty.

[7] The following instructions are relevant to the question of individual guilt:

> But the more important factor, ladies and gentlemen of the jury, is that the instructions which are given to you refer to each individual. They do not refer to both.
>
> In other words, there are multiple defendants in this particular case and they are entitled to separate consideration by you as to their guilt or as to their innocence. That goes for the housebreaking. That goes for the grand larceny and for petty larceny. Both defendants are entitled to *separate consideration*, just as though you started this case yesterday against one defendant and only had the one defendant before you, and at the conclusion of that you started another case against the other defendant. Because both are entitled to that.
>
> The government has the responsibility of proving by competent evidence the guilt of both defendants. (II Tr. 98) (Emphasis supplied)

The trial judge's refusal to instruct further on knowledge and his remark to counsel to that effect could have been based on his well founded belief that he had already sufficiently instructed on the necessity of knowledge. His remark to counsel may have reflected a desire not to make specific comment on the evidence but in any event its meaning is not relevant. The jury did not hear the remark rather it heard an instruction which appellee asserts was clear and proper.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

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LAWRENCE GARNETT,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

Docket Number 20,122

Appeal from a judgment of the United States District Court for the District of Columbia.

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Court Appointed Counsel
for Appellant

QUESTIONS PRESENTED

I. Did the trial court err in failing to instruct the jury, when so requested, that feelings of guilt reflected from flight do not necessarily reflect actual guilt?

II. Did the trial court err in failing to instruct the jury, when so requested, that an aider and abetter must have knowledge of the commission of a crime?

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LAWRENCE GARNETT,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

Docket Number 20,122

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TABLE OF CASES

1. Miller vs. United States, 116 App. D.C. 45, 320 F.2d 767 (1963)

2. Wright vs. United States, 116 App. D.C. 60, 320 F.2d 782 (1963)

JURISDICTIONAL STATEMENT

Appellant was indicted for housebreaking and grand larceny alleged to have been committed in the District of Columbia. Hence, the United States District Court for the District of Columbia had jurisdiction (§ 11-521 D. C. Code 1961). A judgment of guilty to violation of §§ 22-2201 D. C. Code 1961, grand larceny, was rendered on April 7, 1966. Appeal is made from that judgment.

STATEMENT OF CASE

At approximately 11:30 o'clock A.M. on November 29, 1965, District of Columbia Police Officers Orman and Gambino responded to a radio call to investigate a report of several Negro males tampering with an automobile in the area of the 400 block of Eye Street, Northwest, in the District of Columbia. (1 Tr. 28, 29, 34 and 35). They turned their patrol wagon north into the alley behind the west side of the 900 block of Third Street, Northwest, and saw a 1961 Cadillac convertible parked in the alley (1 Tr. 34) and further observed two Negro males loading a large console television set into the trunk of this car (1 Tr. 35). As the police wagon turned into the alley, the two Negro males saw the police and they both immediately set the television down in the trunk of the Cadillac and ran. (1 Tr. 35). Officer Gambino immediately alighted from the patrol wagon and chased the two Negro males. Officer Orman pulled the patrol wagon abreast of the Cadillac and radioed a report of the incident to the police radio dispatcher. (1 Tr. 35, 36). Officer Gambino,

meanwhile, chased one of the Negro males through an empty lot to Fourth Street and north on Fourth Street, then west on K Street and then south through an empty lot to the rear of the 400 block of K Street, at which time he was apprehended. (I Tr. 48). The other Negro male had run south on Fourth Street, and had not been chased any further. Officer Gambino testified that when he caught up with this Negro male, the Negro male, who turned out to be Lawrence Garnett, the Appellant in this case, stated, "What are you chasing me for? I didn't steal it. I didn't know it was stolen. I was just helping him move it." (I Tr. 49). The accused, Lawrence Garnett clearly denied that he made any such statement. (II Tr. 62). Lawrence Garnett was immediately searched, but nothing was recovered from him at that time, including money and whiskey bottles. (I Tr. 55). Lawrence Garnett stated that he had been drinking and was afraid he would be arrested for drinking in public. (II Tr. 55). Lawrence Garnett testified that he had just bought a bottle of wine which was in his pocket, though he had not been drinking it and was not drunk at all. (II Tr. 59). Lawrence Garnett stated to Officer Gambino that the empty bottle was in the alley, but Officer Gambino stated that the alley was full of all kinds of empty bottles, that there must have been 20 of them in sight (I Tr. 55 and 56).

Meanwhile, Officer Orman noticed another Negro male lying across the seat in the 1961 Cadillac. This Negro male then ran from the scene and was chased but got away. He was later identified, however, and was indicted and tried with the defendant in this case, Lawrence Garnett. He was found not guilty on all counts.

Eva Walls testified that she lived at 916 Third Street, Northwest, which was the house adjoining the place in the alley where the 1961 Cadillac was parked, She stated she owned the television which was in the trunk of the Cadillac, and she further testified that when she left her house on the morning of November 29, 1965 the television had been in her home (11 Tr. 6). She also testified that between $8 and $9 was missing from under the scarf to the dresser in her bedroom. (11 Tr. 7). She testified further that she had paid $339 for the television in the end of 1964.

Lawrence Garnett testified in his own defense. (11 Tr. 47-66). He testified that after buying a half pint of wine at about 10:30, he went over to the alley to take a drink and saw one Bob Mitchell, who called him. He stated he went over to Mitchell and asked what he wanted. He stated that Mitchell asked him to move a television set around in the trunk of a car. He testified that he assisted Mitchell in moving it around in the trunk. He then went to take a drink and looked up the alley, and saw the police coming, so he ran. He stated he hid the bottle underneath a car.

STATEMENT OF POINTS

1. The trial judge should have instructed the jury, as requested, in appropriate language that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt.

2. The trial judge should have honored the defendant's request for an instruction that the defendant Garnett must have known that the television had been stolen before he could be guilty as an aider or abetter in its theft (II Tr. 114).

SUMMARY OF ARGUMENT

1. The trial judge should have instructed the jury, as requested, in appropriate language that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt.

(a) The Chief Judge of this Court, in a discussion in his separate opinion in Miller vs. United States indicated that if requested, the trial judge should give an instruction that flight does not necessarily reflect feelings of guilt, and that feelings of guilt do not necessarily reflect actual guilt.

(b) The instruction given by the trial judge in this case did not contain both elements of the instruction as discussed by the Chief Judge.

(c) In Wright vs. United States, a three judge panel of this Court adopted the thinking of the Chief Judge as the position of this Court.

(d) Failure to instruct the jury as requested prejudiced the defendant.

II. The trial judge should have honored defendant's request for an instruction that the defendant must have known that the television had been stolen before he could be guilty for aiding and abetting in the theft of the television set.

(a) Defendant's implication in the larceny in this case is established solely by his joint possession, with another person, of the property which had been stolen.

i. This possession of recently stolen property reportedly raised a presumption that the possessor of the property was guilty of its theft.

(b) Defendant denied implication in the theft, and further denied knowledge that the television had been stolen.

(c) The trial judge refused to instruct the jury that knowledge that the television set had been stolen would be necessary to convict the defendant if he was merely assisting another in moving the television set.

i. Instead, the trial judge instructed that if as few as one of the defendants assisted in the commission of the offense charged, then they would be both charged as principals.

(d) An aider or abetter involved in transporting or disposing of stolen property must know it to have been stolen in order to be guilty of the theft of the property as a principal.

III. Conclusion.

ARGUMENT

POINT I.

THE TRIAL JUDGE SHOULD HAVE INSTRUCTED THE JURY, AS REQUESTED, IN APPROPRIATE LANGUAGE THAT FLIGHT DOES NOT NECESSARILY REFLECT FEELINGS OF GUILT, AND THAT FEELINGS OF GUILT, WHICH ARE PRESENT IN MANY INNOCENT PEOPLE, DO NOT NECESSARILY REFLECT ACTUAL GUILT.

(Note: Read Volume I, Pages 86, 108, 114, 48 and 49, 55, and Volume II, Page 50, of the transcript).

Both police officers who saw the defendant and another man putting a television set into the trunk of the car have testified that both of the men putting the television into the car ran. The defendant, who was one of those men who ran, was chased by a policeman, and was caught. The prosecution entered this testimony into the case, and it was corroborated by the defendant in his testimony. Counsel for the defendant requested an instruction on the manner in which the jury should consider this evidence of "flight", and suggested that the instruction should conform with the discussion of Chief Judge Bazelon in Miller vs. United States, 116 App. D.C. 45, 320 F.2d 767 (1963). In that case, though Judge Bazelon had already determined to reverse the defendant's conviction on other grounds, he indicated he thought it advisable to discuss the appropriate instruction on flight in the District of Columbia. At Page 770 in the Federal Reporter, Chief Judge Bazelon states as follows:

> "Two factual assumptions underline the legal relationship between flight and guilt: (1) that one who flees shortly after a criminal act is committed or when he is accused of committing it does so because he feels some guilt concerning that act; and (2) that one who feels some guilt concerning an act has committed the act. Both assumptions purport to rest on time and experience, not moral principles."

Judge Bazelon went on to review the substantial judicial disagreement with the first of these factual assumptions, and the substantial judicial conclusion that in many cases persons flee for some other reason than feelings of guilt. Judge Bazelon expressly did not stop his discussion of a proper flight instruction with agreement with these other judicial pronouncements. On the contrary, he expressed concern about the validity of the second assumption, that is, that one who feels some guilt concerning an act has committed that act. He then goes on to state "the observation that feelings of guilt may be present without actual guilt in so-called normal as well as neurotic people has been made by many recognized scholars and is a significant factor in the contemporary view of the dynamics of human behavior." On this basis of this reasoning, Chief Judge Bazelon concluded his discussion as follows:

> "When evidence of flight has been introduced into a case, in my opinion the trial court should, if requested, explain to the jury, in appropriate language, that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. This explanation may help the jury to understand and follow the instruction which should then be given, that they are not to presume guilt from flight; that they may, but need not, consider flight as one circumstance tending to show feelings of guilt; and that they may, but need not, consider feelings of guilt as evidence tending to show actual guilt."

Counsel for the defendant presented to the Court an instruction incorporating these thoughts. Counsel for the defendant was advised that the trial judge would use an instruction of his own which likewise incorporated these thoughts. The trial judge then instructed the jury as follows:

> 'Now flight or running away does not prove guilt because some people have been known to run when there is no particular reason to do so. But unexplained flight during or following an incident of crime such as that in this particular case is an element which you as jurors have the right, that is you have the right to consider if you so desire or if you so wish in deciding whether or not all the circumstances of this case and the act of running away you may determine may be evidence of a consciousness of guilt so far as the defendant or the defendants are concerned." (II Tr. 108).

The defendant's counsel objected to the fact that the instruction as given on flight did not include Chief Judge Bazelon's second point, that any such consciousness of guilt need not be in fact related to actual guilt. (II Tr. 114-115).

In this case there was testimony, and spontaneous testimony by the defendant, which was corroborated by the arresting officer, that the defendant did have feelings of guilt, but not about the crime of which he was charged. Accordingly, this particular matter was in issue in this case, and because of the nature of the issue, and because of Judge Bazelon's analysis of flight as set forth in the Miller case, supra, the trial judge's instruction should have included an explanation to the jury that any feelings of guilt need not be related to actual guilt of the crime charged.

Inasmuch as the defendant's guilt could not possibly have been based upon direct evidence of his participation in the taking, but only on known events tending to establish his guilt, such as flight, after the taking, it is clear that if the jury is not properly instructed on these circumstances, prejudicial error may have occurred. Put another way, defendant's guilt must have been based upon the following:

1. His possession of recently stolen property; and
2. His flight.

Evidence was introduced by the defendant to explain both his possession of the property and his flight, and the jury was free to either regard or disregard this testimony. However, unless they were properly instructed as to the manner in which to relate this testimony to the commission of the crime, prejudicial error could occur.

Your Appellant contends that the instruction of the trial judge on flight did not fully and properly instruct the jury.

In Wright vs. United States, 116 App. D. C. 60, 320 F.2d 782 (1963), a three judge panel of the Court adopted Chief Judge Bazelon's thinking. Accordingly, though he set forth his reasoning in an opinion in which none of his fellow judges joined, the incorporation of that thinking into the per curiam decision in Wright vs. United States adopted his thinking as the thinking of the Court.

We recognize that in both the Miller case and the Wright case the particular language which was principally objected to was the language

that flight creates a presumption of guilt. We recognize the trial judge in this case did not thus instruct the jury. Rather, he limited his instruction to flight evidencing a "consciousness of guilt". However, this distinction is of no importance in view of the fact that the trial judge did not go on to explain, when requested, that the consciousness of guilt need not relate to actual guilt of the crimes of larceny and housebreaking with which this defendant was charged.

POINT II.

THE TRIAL JUDGE SHOULD HAVE HONORED DEFENDANT'S REQUEST FOR AN INSTRUCTION THAT THE DEFENDANT MUST HAVE KNOW THAT THE TELEVISION HAD BEEN STOLEN BEFORE HE COULD BE GUILTY FOR AIDING AND ABETTING IN THE THEFT OF THE TELEVISION SET.

(Note: Read Pages 114 and 106 of Volume II, and Pages 35, 47 and 49 of Volume I of the transcript).

No evidence was presented to indicate that the defendant actually entered the premises of the victim and carried out the television set. No evidence was presented that the defendant knew it had been stolen, and in fact the defendant denied he knew it had been stolen. On the other hand, there was evidence that at least one other person was directly involved with the carrying of the television set, and at least a second other person was involved by being present in the car. There was testimony to indicate that it would take two people to move the television set, and presumably this is the number required to take it from the house of the victim and carry it to the car, as well as to place it in the trunk of the car.

But there is proof only on the point that the defendant participated in moving it in the trunk of the car. There is no evidence that he assisted in carrying the television from the house to the alley.

Thus it is that a presumption became of material importance in the government's case against this defendant. That presumption was the presumption of guilt arising from possession of recently stolen property. We do not contest this presumption as such, but rather we do contest its application under the facts of this case, under instructions which would indicate the guilt of the defendant by his joint possession of the television set, even if he had not participated in the actual taking of the television set, and even if he did not even know that it had been stolen by others. We do not believe that the crime of larceny should cover, nor was it ever intended to cover, an unknowing assistance provided to a friend who asks for assistance in moving a piece of property--which turns out to have been stolen property.

Counsel for the defendant requested an instruction that if the jury believed that the defendant was present at the scene only because requested to be there by Mitchell, then moving the television set would not be sufficient basis on which to find him guilty of aiding and abetting, that is as a principal. The judge replied to this request that it would involve a determination on whether or not the defendant knew the television was stolen, and that is what he wanted to keep away from. (II Tr. 114).

Instead, the judge had instructed as follows:

> "If you find beyond a reasonable doubt that one defendant in this case or both defendants did act in the assisting or in the commission of the offense charged, then they are charged as principals." (II Tr. 106).

The above instruction, combined with the judge's refusal to instruct on the defendant's knowledge, could clearly have led the jury to believe that by merely having partial possession of the television set in order to assist Mitchell in moving it, the defendant could have been guilty of aiding and abetting, whether he knew it was stolen or not. In 21 Am.Jur. 2d, Page 199, Criminal Law, Section 123, "Intent", it is stated as follows:

> "Where a crime requires the existence of a particular intent, an alleged aider or abetter cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself possessed the required felonious intent."

With particular reference to larceny, a particular application of this rule is stated in 32 Am.Jr. 948, Larceny, Section 49 as follows:

> "In most jurisdictions, one who assists in transporting or disposing of the stolen property, knowing it to have been stolen, may be held guilty of the larceny as a principal, even though he was not present at the taking and neither instigated the crime nor took part as a conspirator." (Emphasis added).

Put another way, there would have to be some evidence that the defendant either participated in the actual taking, or was a conspirator with regard to the taking, or that he knew of the criminal taking. In this case there was absolutely no evidence as to the taking at all. There was no

evidence at all as to any conspiracy. The only evidence is evidence of joint possession by two people of property which was recently stolen, and one of those two people (Appellant) has been brought to trial.

Even if the jury had believed the defendant's testimony that he merely assisted in moving the television set, the jury could have nevertheless found him guilty under the instructions of the trial judge. This follows from the fact that the trial judge refused to give an instruction on the defendant's knowledge that the property was stolen, and instead had given an instruction that if one of the defendants merely acted in the assisting of the offense charged, then both defendants would be principals in the crime. This would have allowed the jury to find the defendant guilty even though he had no knowledge of the commission of the crime. This error clearly prejudiced the defendant.

CONCLUSION

WHERFFORE, your Appellant prays that this Court reverse the judgment of conviction entered against this Appellant by the United States District Court for the District of Columbia on the 7th day of April, 1966.

ROBERT V. SCHNABEL